International Longshore and Warehouse Union, Local 12 *and* Southport Lumber Company, LLC.
Case 19–CD–144202

September 30, 2019

DECISION AND ORDER DENYING MOTION

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

Upon a charge filed by Southport Lumber Company, LLC (Southport) on January 12, 2015, the General Counsel of the National Labor Relations Board issued a complaint on October 30, 2018, against International Longshore and Warehouse Union, Local 12 (the Respondent) alleging that it had violated Section 8(b)(4)(ii)(D) of the National Labor Relations Act.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The complaint alleges that since about September 4, 2014, the Respondent has demanded that Southport assign the work of button pushing for chip loading and log unloading at its barge slip on Coos Bay in North Bend, Oregon (the disputed work), to employees who are represented by the Respondent, rather than to Southport's own employees. The complaint also alleges that on September 4 and December 4, 2014, and unspecified dates thereafter, the Respondent picketed at Southport's premises in support of that demand and with the goal of forcing Southport to assign the disputed work to employees represented by the Respondent. The complaint further alleges that the Respondent has failed and refused to comply with the Board's October 11, 2018 Decision and Determination of Dispute in the earlier Section 10(k) proceeding,[1] which awarded the disputed work to Southport's employees, by failing to give the Regional Director written assurance of its intent to comply with the decision.

On November 13, 2018, the Respondent filed an answer admitting in part and denying in part the complaint allegations and denying the commission of any unfair labor practices. The Respondent denied, inter alia, that Southport assigned the disputed work to its own employees; that the Respondent demanded Southport assign the work to employees represented by the Respondent; and that the Respondent picketed Southport's premises with an object of forcing Southport to assign the work to employees represented by the Respondent. The Respondent also asserted five affirmative defenses, including that (1) the complaint does not allege conduct that violates Section 8(b)(4)(ii)(D); (2) it fails to present a jurisdictional dispute between groups of employees; (3) the alleged conduct was lawful primary activity under the work preservation doctrine; (4) the work is the functional equivalent of traditional longshore work and thus fairly claimable by the Respondent; and (5) the dispute is of Southport's making because it had assigned the work to employees represented by the Respondent and bargained with it over the work, then ceased assigning it to those employees.

On December 17, 2018, the General Counsel filed a Motion to Transfer Case to the Board and for Summary Judgment. In its motion, the General Counsel argues that summary judgment is appropriate because the sole factual issues in dispute were resolved by the Board's award in the 10(k) proceeding. According to the General Counsel, the denials in the Respondent's answer to the complaint are inconsistent with its representations and stipulations in the 10(k) proceeding, the Board's findings in the 10(k) decision, or both. Likewise, the General Counsel claims, each of the Respondent's five affirmative defenses was litigated and rejected in the10(k) proceeding. The Respondent did not file an opposition to the General Counsel's motion.

We find, contrary to the General Counsel and notwithstanding the 10(k) award, that the pleadings in this case raise genuine issues of material fact that can best be resolved by a hearing before an administrative law judge. The litigation of an 8(b)(4)(D) allegation differs significantly from a 10(k) proceeding. Unlike in the underlying 10(k) proceeding, which requires only a demonstration of reasonable cause to believe that Section 8(b)(4)(D) has been violated, in an unfair labor practice proceeding, the General Counsel must prove that the respondent violated Section 8(b)(4)(D) by a preponderance of the evidence. *NLRB v. Plasterers Local Union No. 79*, 404 U.S. 116, 122 fn. 10 (1971). Moreover, "the Board's Section 10(k) procedure, unlike the unfair labor practice procedure, does not call for assessments of the credibility of witnesses." *Plumbers Local 562 (C&R Heating & Service Co.)*, 328 NLRB 1235, 1235 (1999).

After the 10(k) award, both parties to an 8(b)(4)(D) charge may offer new evidence, and the respondent need not offer previously unavailable evidence to be entitled to a hearing on that allegation. *Longshoremen ILWU Local 6 (Golden Grain)*, 289 NLRB 1, 2 (1988); see also *Plasterers Local 79*, 404 U.S. at 122 fn. 10. In addition, "[t]he findings and conclusions in a 10(k) proceeding are

[1] *Longshoremen ILWU Local 12 (Southport Lumber Co.)*, 367 NLRB No. 16 (2018). In that decision, the Board found reasonable cause to believe that the Respondent's picketing violated Sec. 8(b)(4)(D) of the Act.

not res judicata on the unfair labor practice issue in the later § 8(b)(4)(D) determination." *Golden Grain*, 289 NLRB at 2; quoting *Plasterers Local 79*, 404 U.S. at 122 fn. 10. The Board, however, will not relitigate threshold matters that are not necessary to prove an 8(b)(4)(D) violation, e.g., the existence of an agreed-upon method of resolving the dispute, *Golden Grain*, 289 NLRB at 2 fn. 4, nor will it relitigate the Board's 10(k) determination in the subsequent 8(b)(4)(D) case, *International Longshore & Warehouse Union and International Longshore & Warehouse Union Local 4 (Kinder Morgan)*, 367 NLRB No. 64, slip op. at 5 (2019).[2]

Consequently, summary judgment in the 8(b)(4)(D) proceeding is appropriate only if there is no genuine issue of material fact or if the parties have stipulated the record of the 10(k) hearing as a basis for the Board's determination of the unfair labor practice charge. *Marble Polishers Local 47-T (Grazzini Bros.)*, 315 NLRB 520, 521 (1994) (citing *Golden Grain*, 289 NLRB at 2). Furthermore, a genuine issue of material fact exists, and a respondent is entitled to a hearing, if there are credibility issues to be resolved or if the respondent denies the existence of an element of the 8(b)(4)(D) violation, either directly or by raising an affirmative defense. *Grazzini Bros.*, 315 NLRB at 521.

We find that there are genuine issues of material fact in dispute here. The parties have not stipulated the 10(k) record as a basis for the 8(b)(4)(D) unfair labor practice determination. Moreover, the Respondent has denied the substantive factual allegations underpinning the 8(b)(4)(D) allegation and asserted several affirmative defenses in its answer to the complaint. The Board's underlying 10(k) award also highlighted the existence of possible credibility issues. 367 NLRB No. 16, slip op. at 4 fn. 17. Accordingly, we conclude that summary judgment is inappropriate in the instant case, and we deny the General Counsel's motion. See *Laborers Local 721 (Hawkins & Sons)*, 294 NLRB 166, 168 (1989) (denying General Counsel's Motion for Summary Judgment because the respondent denied it engaged in work stoppages and picketing and asserted its actions were to retrieve work previously assigned to the respondent); see also *Golden Grain*, 289 NLRB at 2.

ORDER

It is ordered that the General Counsel's motion is denied and the proceeding is remanded to the Regional Director for Region 19 for further appropriate action.

Dated, Washington, D.C. September 30, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[2] Although the Respondent's failure to provide the required assurance of its intent to comply with the Board's determination in the 10(k) proceeding may serve as a triggering event for the issuance of a complaint, it does not constitute an independent basis for finding an 8(b)(4)(D) violation. See *Golden Grain*, 289 NLRB 1 fn. 3.